Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 77-2116

ROBERT CLIFTON MARLER,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

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Petitioner, ROBERT CLIFTON MARLER, prays that a Writ of Certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of San Diego which affirmed without opinion the judgment of the Municipal Court of the San Diego Judicial District convicting petitioner of violating California Penal Code Section 311.2 (sale of obscene matter).

PROCEEDINGS BELOW

No written or oral opinions were rendered in this matter. A misdemeanor complaint was filed on behalf of respondent by the City Attorney of San Diego alleging that petitioner violated Penal Code Section 311.2 on February 24, 1976. On September 1, 1976, petitioner was found guilty by a jury. The judgment of conviction was entered on December 13, 1976 by Judge Carlos A. Cazares of the Municipal Court of the San Diego Judicial District. No opinion was rendered by him.

Petitioner appealed his conviction to the Appellate Department of the Superior Court of the State of California for the County of San Diego, which affirmed the conviction without opinion on May 18, 1977. A copy of the two word Order ("Judgment affirmed") is reprinted in Appendix A to this Petition. Petitioner's petition for rehearing and applications for certification to the California Court of Appeal, Fourth Appellate District, Division One and for publication of opinion were denied on June 14, 1977. A copy of the June 14th Order is reprinted in Appendix B to this Petition.

JURISDICTION

The date of the judgment sought to be reviewed is May 18, 1977. This Court has jurisdiction under 28 U.S.C. §1257(3). The Appellate Department of the Superior Court of the State of California for the County of San Diego is the highest state

court to which a misdemeanor appeal can be taken, California Constitution, Article VI, §11; California Penal Code §1471; California Rules of Court, Rules 62 and 63, unless certification is granted; it was denied herein. See Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973); Kuhns v. California, 419 U.S. 1066, 42 L.Ed.2d 662, 95 S.Ct. 651 (1974); Schmerber v. California, 384 U.S. 757, 759 n. 3, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1966).

QUESTIONS PRESENTED

1. Whether issue number 14 of the newsmagazine, Finger is protected by the First and Fourteenth Amendments to the United States Constitution;

2. Whether petitioner's conviction for violating California Penal Code §311.2 is inconsistent with the scienter requirement of Smith v. California, 361 U.S. 147, 4 L.Ed.2d 205, 80 S.Ct. 215 (1959), reh. den. 361 U.S. 950, 4 L.Ed.2d 383, 80 S.Ct. 399 (1960) and Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958, reh. den. 384 U.S. 934, 16 L.Ed.2d 535, 86 S.Ct. 1440 (1966) and therefore violative of the First and Fourteenth Amendments to the United States Constitution;

3. Whether petitioner's conviction for violating California Penal Code §311.2 is unconstitutional under the due process clause of the Fourteenth Amendment because there was no

evidence of scienter, a critical element in an obscenity prosecution. Thompson v. Louisville, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624 (1960);

4. Whether petitioner's due process right to a fair trial and an impartial judge was violated by the judge's statement to the jury that most people disapprove of the type of magazine on trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution and California Penal Code Section 311.2(a).

First Amendment:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourth Amendment:

"Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection

of the laws. . . ."

California Penal Code Section 311.2(a) provides, in pertinent part, as follows:

> "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor."

STATEMENT OF THE CASE

Petitioner is the owner and licensee of a licensee to operate a book store in San Diego, California. He resided in Fullerton, California. San Diego police officer Howard Goldy purchased a news-magazine, "Finger" (issue number 14), from a clerk, Donna Ingalls, at the bookstore on February 24, 1976. The bookstore had a variety of books, magazines, and newspapers available for purchase: e.g., the New York Times, TV Guide, Jaws, All the President's Men, and so-called "adult material" of the kind available in adult bookstores. The bookstore was very large and had numerous books, magazines, and newspapers available.

The store was operated by James Chapman, who managed the premises since January 1976. He had only seen petitioner in the store three or four times between January 1976 and the time of the trial (August 31, 1976). Chapman did not order the materials sold at the store and no other employee did either, to his knowledge.

Officer Goldy, clerk Ingalls, and manager Chapman all testified for the prosecution. Petitioner did not testify and called no witnesses.

During jury selection, the trial judge made the following statement to a prospective juror which was heard by all the prospective jurors:

> ". . . [D]on't feel badly because you happen to disapprove of this type of magazine.
>
> "I think that, by and large, most people do. I don't know most people --"

Petitioner's counsel interrupted the judge at this point and, outside the presence of the prospective jurors, moved for a mistrial and moved for an order discharging all the jurors (those tentatively seated in the box and those in the audience) who heard the statement, but the motions were denied. The prospective jurors who heard the statement eventually became the trial jurors (petitioner did not have enough peremptory challenges to eliminate them). Petitioner accepted the jury under protest.

The jury found petitioner guilty of violating Penal Code Section 311.2(a). The jury was instructed with respect to the word "knowingly" in Penal Code Section 311.2(a):

> "'Knowingly' means being aware of the contents of the matter. It does not mean knowledge that the matter was legally obscene."

In the trial court petitioner argued there was no evidence of "scienter" and that "Finger" was not obscene. The "scienter" argument was made in a pretrial motion to dismiss, in a motion for a directed verdict after the prosecution rested, in argument to the jury, and in a motion for new trial.

Petitioner appealed his conviction to the Appellate Department of the Superior Court, where he made a number of arguments, including the ones set forth in this petition (except he did not specifically argue "Finger, No. 14" was protected by the First and Fourteenth Amendments).

The Appellate Department affirmed without opinion.

REASONS FOR GRANTING THE WRIT

A. The Judgment Below Violates Petitioner's Rights Under the Free Speech Provisions of the First and Fourteenth Amendments and the Due Process Clause of the Fourteenth Amendment

1. Free Speech

a. Issue No. 14 of Finger

The news-magazine which is the basis for the conviction is protected by the First and Fourteenth Amendments to the United States Constitution. This Court has a duty under the Constitution to examine the alleged obscene matter and to make an independent determination as to its "obscenity." See Jenkins v. Georgia, 418 U.S. 153, 41 L.Ed.2d 642, 94 S.Ct. 2750 (1974). While petitioner did not specifically contend in his briefs filed with the Appellate Department that the news-magazine was protected by the constitution, it is clear the Appellate Department, aware of its duty to examine materials in obscenity cases to determine independently whether they are constitutionally protected, considered the news-magazine. It was delivered to the Appellate Department by the municipal court on January 4, 1977 as part of the record on appeal; the Appellate

Department necessarily considered the question when it examined the news-magazine. It necessarily concluded that no free speech interest was infringed when it summarily affirmed the conviction. See Jenkins v. Georgia, supra, 418 U.S. at 157, 41 L. Ed. 2d at 648.

b. Scienter

Petitioner's conviction for sale of an obscene news-magazine, without evidence of scienter, violates the free speech provisions of the First and Fourteenth Amendments. In invalidating an ordinance which imposed absolute criminal liability for the sale of obscene matter without regard for the seller's knowledge, the Court in Smith v. California, 361 U.S. 147, 153, 4 L. Ed. 2d 205,211, 80 S. Ct. 215 (1959), reh. den. 361 U.S. 950, 4 L. Ed. 2d 383, 80 S. Ct. 390 (1960) stated,

> "By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as

obscene literature."

2. Due Process

a. Lack of Evidence

Insofar as an element of the crime is "scienter," the conviction violates the due process clause of the Fourteenth Amendment. Thompson v. Louisville, 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960)(violation of due process to convict without evidence of guilt).

b. Unfair Trial

Petitioner was deprived of a fair trial because the trial judge made a disparaging remark about the news-magazine, "Finger" (No. 14) in the presence of the jury. It is elementary that a trial judge must be fair and impartial. Tumey v. Ohio, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437 (1927); In re Murchison, 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623 (1955); Mayberry v. Pennsylvania, 400 U.S. 455, 27 L. Ed. 2d 532, 91 S. Ct. 499 (1971). The remark contaminated the jury, which heard it the same day the trial concluded (the presentation of evidence took less than one day) and only one day before the verdict was rendered. If pre-trial publicity can prejudice a jury, see e.g., Estes v. Texas, 381 U.S. 532, 14 L. Ed. 2d 543, 85 S. Ct. 1628, reh. den. 382 U.S. 875, 15 L. Ed. 2d

118, 86 S. Ct. 18 (1965) and cases cited therein, a fortiori a statement maligning the very news-magazine on trial at the commencement of the trial by the trial judge certainly may be considered prejudicial.

The error could have been easily corrected at the time but, unfortunately, the trial judge decided to move ahead. The comment was devastating because it went to the heart of the case, the obscenity of the subject matter.

B. The Judgment Below Raises an Important Constitutional Issue Which Should Be Determined By This Court

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This Court has never formulated a test to determine the existence of scienter in obscenity cases. In Smith v. California, supra, the landmark scienter case, this Court recognized that proof of scienter was constitutionally required in obscenity cases. However, the Court expressly declined to,"

> "pass . . . on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock. . . ."
> 361 U.S. at 154, 4 L. Ed. 2d at 212.

Over eleven years ago, in Mishkin v. New York, 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958, reh. den. 384 U.S. 934, 16 L. Ed. 2d 535, 86 S. Ct.

1440 (1966), this Court last considered proof of scienter in an obscenity case. Justice Brennan, expressing the views of five members of the Court in affirming the conviction, stated,

> "Appellant's principal argument is that there was insufficient proof of scienter. This argument is without merit. The evidence of scienter in this record consists, in part, of appellant's instructions to his artists and writers; his efforts to disguise his role in the enterprise that published and sold the books; the transparency of the character of the material in question, highlighted by the titles, covers, and illustrations; the massive number of obscene books appellant published, hired others to prepare, and possessed for sale: the repetitive quality of the sequences and formats of the books; and the exorbitant prices marked on the books. This evidence amply shows that appellant was 'aware of the character of the material' and that his activity was 'not innocent but calculated purveyance of filth.'"
> 383 U.S. at 511-512, 16 L. Ed. 2d at 63-64.

In contrast, there was no evidence in the instant case establishing petitioner's awareness of the character of the material. Essentially, petitioner was an absentee owner. He was not present on the day of the sale, and there was no evidence that issue number 14 of "Finger" was at the location when petitioner was last there. In

short, there was no evidence petitioner ever saw the news-magazine which formed the basis of the conviction.

Petitioner was convicted simply because he owned the store where the news-magazine was sold. Yet, Smith v. California teaches us that this kind of absolute liability may not be tolerated so long as the First Amendment is a part of our constitution.

Review by this Court is necessary so that the scienter formulation of Smith can be explained. Smith did not develop a test, and Mishkin involved a case where scienter had been established. This Court should grant certiorari in order to develop a test for determining scienter. Otherwise, bookstore owners such as petitioner will be forced to limit the number of books and magazines sold, which is precisely what Smith wanted to avoid. At a minimum, by deciding that the facts of this case do not establish scienter, this Court will have given some guidance in that in the future conduct will be able to be measured against the facts of Mishkin and the facts of the instant case, thereby affording some measure of predictability.

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROGER JON DIAMOND

Attorney for Petitioner

APPENDIX A

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
APPELLATE DEPARTMENT
FILED May 18 1977

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ROBERT CLIFTON MARLER, Defendant and Appellant.	SUPERIOR COURT NO. CR 39457 MUNICIPAL COURT NO. M 203274 (San Diego Judicial District)

O R D E R

Judgment affirmed.

BY THE COURT

/s/ Conyers P. J.

/s/ Focht J.

/s/ Welsh J.

APPENDIX B

FILED
Robert D. Zumwalt, Clerk
JUN 14 1977
By_____
Deputy

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
APPELLATE DEPARTMENT
FILED JUN 14 1977

THE PEOPLE OF THE STATE OF CALIFORNIA,	) SUPERIOR COURT) NO. CR 39457
Plaintiff and Respondent,	) MUNICIPAL COURT
v.	) NO. M 203274) (San Diego Judicial
ROBERT CLIFTON MARLER,	) District)
Defendant and Appellant.	) O R D E R

Petition for rehearing is denied.

Application for certification to the Court of Appeal, Fourth Appellate District, Division One, is denied.

Application for order directing publication of opinion is denied.

BY THE COURT: /s/ Conyers P. J.
/s/ Focht J.
/s/ Welsh J.